# Kang Hai Holdings Sdn Bhd & Anor v Lee Lai Ban (trading as the sole proprietor under the name and style of 'Sang Excavating Services')

FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NO 02(f)-65–09 OF 2016 (J)
ZULKEFLI PCA, RICHARD MALANJUM CJ (SABAH AND SARAWAK), ABU SAMAH NORDIN, ZAHARAH IBRAHIM AND PRASAD ABRAHAM FCJJ
19 DECEMBER 2017

*Companies and Corporations — Indoor management rule — When applicable — Respondent relied upon representations of person claiming to be director of appellants to enter appellants' land to extract therefrom and buy earth and rock materials — Respondent failed to carry out any searches to ascertain authority of apparent agent — Whether this failure disentitled respondent from relying on the rule in Turquand's case — Whether circumstances showed respondent had constructive, if not actual, notice of apparent agent's lack of authority — Whether a representation that an apparent agent had authority to act for the principal had to be made by someone who had the principal's actual authority to make that representation — Whether protection under rule in Turquand's case could not be sought if a person merely relied upon an apparent agent's own representation that he had authority to act for the principal*

The respondent in this appeal ('Lee') sought to rely upon the rule in *Turquand*'s case to say his entry upon land owned by the appellants to extract and buy red earth and rock materials from those land ('the work') were legal and valid actions as he carried out the work based on an agreement he had with a person ('Siva') who held himself out as a director of the appellants. In actual fact, when Siva permitted Lee to carry out the work, he had ceased to be a director of the appellants. Although Lee subsequently learnt that Siva was not authorised to transact any business on behalf of the appellants, he nevertheless continued performing the work. The appellants sued Siva and Lee in the High Court for various reliefs. The gist of their case was that Siva had fraudulently held himself out as a director cum manager of the appellants when he engaged Lee to carry out the work and had received below market value monies from Lee as payment for the work and that Lee, despite having actual or constructive knowledge of Siva's lack of authority to act on behalf of the appellants, nevertheless continued to trespass on the appellants' land and carried out the work illegally. Lee's defence, inter alia, was that he had at all material times relied upon Siva's representations to him. The High Court found as a fact that Siva never had actual or ostensible authority to act on behalf of the appellants and that Lee —

A particularly after he came to know that Siva had no authority to act for the appellants — was at fault for not having carried out any land searches or searches with the Companies Commission of Malaysia ('CCM') to ascertain Siva's actual position. The Court of Appeal ('COA'), despite acknowledging Lee's failure to carry out the land/CCM searches, set aside the High Court's B verdict and held that there was no evidence to show Lee should have been put on enquiry about Siva's authority. The Federal Court granted the appellants leave to appeal against the COA's decision on two questions of law: (a) whether the rule in *Turquand*'s case applied in a situation where an outsider dealing with a company was deemed to have constructive notice of the identity of the C directors and managers of the company as set out in its Form 49; and (b) whether an outsider could rely on the rule in *Turquand*'s case and principles of ostensible authority to bind a company where the 'holding out' or representation of authority was made solely by the person who had in fact no authority.

D

**Held,** allowing the appeal, answering both leave questions in the negative, setting aside the decision of the COA and restoring the decision of the High Court:

E (1) The COA misdirected itself in reversing the High Court's finding of facts. The COA accepted that Lee had failed to make any land searches or searches with the Companies Commission of Malaysia. This specific issue as a corollary to the rule in *Turquand* was not considered by the COA as a precondition for reliance upon that rule. The searches clearly revealed that Siva was not a director/managing director of the appellants F and Lee was deemed to have constructive knowledge of that fact and it did not matter whether he believed Siva was a director/managing director by reputation or otherwise. The law imposed a minimum duty on the 'outsider' ('Lee') to at the very least make that minimum check to afford him the protection of the rule in *Turquand*'s case. Knowledge of the G particulars contained in the appellants' Form 49 had to be imputed to Lee and he should have taken steps to enquire further in order to come within the rule in *Turquand*'s case (see paras 12, 14, 17, 20 & 25).

(2) Lee had pleaded that the only representation of Siva's ostensible authority H was made by Siva himself. Since Lee had constructive knowledge that Siva was not the managing director/director of the appellants at the time of the contract, Lee could not, in the circumstances, rely upon the rule in *Turquand*'s case. (see paras 22 & 24).

I **[Bahasa Malaysia summary**

Responden dalam rayuan ini ('Lee') memohon untuk bergantung kepada rukun dalam kes *Turquand* untuk mengatakan kemasukannya ke atas tanah-tanah tersebut yang dimiliki oleh perayu-perayu untuk mengeluarkan dan membeli tanah merah dan bahan batu-batan daripada tanah-tanah

tersebut ('kerja tersebut') adalah tindakan yang mematuhi undang-undang dan sah kerana dia menjalanan kerja tersebut berdasarkan perjanjian antaranya dan seorang ('Siva') yang memperkenalkan dirinya sebagai pengarah perayu-perayu. Pada hakikatnya, apabila Siva membenarkan Lee menjalankan kerja tersebut, dia telah berhenti menjadi pengarah perayu-perayu. Walaupun Lee kemudian mendapati bahawa Siva tidak diberi kuasa untuk berurus niaga apa-apa perniagaan bagi pihak perayu-perayu, dia walau apa pun telah meneruskan untuk melaksanakan kerja tersebut. Perayu-perayu telah menyaman Siva dan Lee di Mahkamah Tinggi untuk pelbagai relif. Inti pati kes mereka adalah bahawa Siva telah secara fraud memperkenalkan dirinya sebagai pengarah juga pengurus perayu-perayu apabila dia melantik Lee untuk menjalankan kerja tersebut dan telah menerima wang di bawah nilai pasaran daripada Lee sebagai bayaran untuk kerja tersebut, meskipun mempunyai pengetahuan konstruktif atau sebenar tentang Siva yang tiada kuasa untu bertindak bagi pihak perayu-perayu, walau apa pun telah terus menceroboh ke atas tanah-tanah perayu-perayu dan menjalan kerja tersebut secara haram. Pembelaan Lee, antara lain, adalah bahawa dia pada setiap masa matan telah bergantung kepada representasi Siva kepadanya. Mahkamah Tinggi mendapati pada hakikatnya adalah Siva tidak mempunyai kuasa sebenar atau yang boleh dipercayai untuk bertindak bagi pihak perayu-perayu dan bahawa Lee — khususnya selepas dia mengetahui bahawa Siva tidak mempunyai kuasa untuk bertindak bagi pihak perayu-perayu — adalah bersalah kerana tidak menjalankan apa-apa carian tanah atau carian dengan Suruhanjaya Syarikat Malaysia ('SSM') untuk memastikan kedudukan sebenar Siva. Mahkamah Rayuan ('MR'), walaupun mengakui kegagalan Lee untuk menjalankan carian tanah/SSM, telah mengetepikan keputusan Mahkamah Tinggi dan memutuskan bahawa tiada keterangan untuk menunjukkan Lee patut membuat siasatan tentang kuasa Siva. Mahkamah Persekutuan telah memberikan perayu-perayu kebenaran untuk merayu terhadap keputusan MR berhubung dua persoalan undang-undang: (a) sama ada rukun dalam kes *Turquand* terpakai dalam situasi di mana orang luar berurusan dengan syarikat dianggap sebagai notis konstruktif berhubung identiti pengarah dan pengurus syarikat sepertimana dinyatakan dalam Borang 49nya; dan (b) sama ada orang luar boleh bergantung kepada rukun dalam kes *Turquand* dan prinsip-prinsip kuasa yang boleh dipercayai untuk mengikat syarikat di mana kuasa 'holding out' atau representasi telah dibuat semata-mata oleh orang yang pada hakikatnya tiada kuasa.

**Diputuskan,** membenarkan rayuan, menjawab kedua-dua persoalan kebenaran secara negatif, mengetepikan keputusan MR dan mengembalikan keputusan Mahkamah Tinggi:

(1) MR telah salah arah dalam mengakas dapatan fakta Mahkamah Tinggi. MR menerima yang Lee telah gagal membuat apa-apa carian tanah atau carian dengan Suruhanjaya Syarikat Malaysia. Isu spesifik ini sebagai

A rumusan kepada rukun dalam *Turquand* tidak diambil kira oleh MR sebagai prasyarat untuk kebergantungan kepada rukun tersebut. Carian-carian itu jelas menunjukkan bahawa Siva bukan pengarah/pengarah urusan perayu-perayu dan Lee dianggap mempunyai pengetahuan konstruktif terhadap fakta itu dan ia tidak penting sama ada B dia mempercayai Siva adalah pengarah/pengarah urusan berdasarkan reputasi atau sebaliknya. Undang-undang mengenakan kewajipan minimum ke atas 'outsider' ('Lee') untuk sekurang-kurangnya membuat semakan minimum bagi memberinya perlindungan rukun dalam kes *Turquand*. Pengetahuan butiran yang terkandung dalam Borang 49 C perayu-perayu hendaklah dikaitkan dengan Lee dan dia patut telah mengambil langkah-langkah untuk menyiasat lebih lanjut untuk terjatuh dalam rukun kes *Turquand* (lihat perenggan 12, 14, 17, 20 & 25).

D (2) Lee telah mempli bahawa hanya respresentasi berhubung kuasa yang boleh dipercayai Siva telah dibuat oleh Siva sendiri. Oleh kerana Lee mempunyai pengetahuan konstruktif bahawa Siva bukan pengarah urusan/pengarah perayu-perayu pada masa kontrak itu, Lee tidak boleh, dalam keadaan itu, bergantung kepada rukun dalam kes *Turquand* (lihat E perenggan 22 & 24).]

**Notes**

For cases on when applicable, see 3(1) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 480–485.

F

**Cases referred to**

*Criterion Properties plc v Stratford UK Properties LLC and others* [2004] UKHL 28, HL (refd)

*Freeman and Lockyer (a firm) v Buckhurst Park Properties (Mangal) and Another* G [1964] 1 All ER 630, CA (refd)

*KL Engineering Sdn Bhd & Anor v Arab Malaysian Finance Bhd* [1994] 2 MLJ 201, SC (refd)

*Northside Developments Pty Ltd v Registrar-General* (1990) 93 ALR 385, HC (folld)

H *Pekan Nenas Industries Sdn Bhd v Chang Ching Chuen & Ors* [1998] 1 MLJ 465, FC (refd)

*Royal British Bank v Turquand* [1843–60] All ER Rep 435 (refd)

**Legislation referred to**

I Companies Regulations 1966 Form 49
Evidence Act 1950 s 114(g)

**Appeal from:** Civil Appeal No J-02(NCVV)(W)-2119–12 of 2014 (Court of Appeal, Putrajaya)

*David Matthews (Harvinderjit Singh and Malarvily Perumal with him) (Vin Partnership) for the appellants.*
*HY Lee (Lee Han Yen & Co) for the respondent.*

**Prasad Abraham FCJ (delivering judgment of the court):**

INTRODUCTION

**[1]** We heard this appeal and the arguments presented by the appellants and the respondents on 27 September 2017 and we reserved the matter to a date to be fixed. We now deliver our judgment on the same to support the orders the court makes today.

**[2]** This appeal touches on the question of the rule in *Turquand* as it is commonly referred to in Company Law. As it is essentially a fact driven appeal, before dealing with the specific questions posed, the material facts should be dealt first. We will refer to the parties by their names as they were described in the High Court.

MATERIAL FACTS

*Undisputed facts*

**[3]** The first plaintiff ('KHH') is the owner of land known as Lots 2929 and 2930 whereas the second plaintiff ('KHR') is the owner of Lot 2980. The first defendant at High Court ('Siva') was a former director of KHH and KHR, who ceased to be a director of KHH and KHR on 15 September 2008 and 19 August 2009 respectively.

**[4]** Siva proceeded to engage the respondent ('Lee'), despite ceasing to be a director of KHH, to extract earth from Lots 2929 and 2930 which commenced from May 2009. Siva and Lee thereafter entered into a tenancy agreement dated 8 September 2009 over Lots 2929 and 2930 whereby Lee was to extract and purchase earth from Lots 2929 and 2930 up to 2012.

**[5]** However in September 2010, Lee met with a director of KHH and KHR who informed Lee that Siva was never authorised to transact on the company's behalf. Despite this, Lee continued extracting earth from the land up to December 2010. Substantial amount of earth was extracted from Lots 2929, 2930 and 2989, between May 2009–December 2010.

A SUMMARY OF THE PLEADINGS

*The plaintiffs' case*

B **[6]** The plaintiffs pleaded the following in their statement of claim:

(a) Siva fraudulently held himself out as a director and manager of KHH and forged the letter dated 1 September 2009 which purported to engage Lee to extract and purchase red earth and rock materials from KHH's land;

C (b) Siva fraudulently held himself out to the Batu Pahat Land Office as an authorised officer of KHH and forged a memo for the purposes of renewing a permit for the extraction of rock materials from Lot 2929 for a period of one year commencing from 1 January 2010;

D (c) from late 2009 to the end of 2010, Lee acting under the directions of Siva gained unlawful entry on the land and extracted and removed red earth and rock materials therefrom;

(d) at all material times, Lee knew that Siva was not an authorised E representative of the plaintiffs and/or chose to be oblivious to this despite clear circumstances existing that would have justified an enquiry into the same;

(e) Lee was put on notice of the illegal trespass on the plaintiffs' land and F conversion of the red earth and rock material at a meeting on 2 September 2010 between the representatives of the plaintiffs and Lee; and

(f) during this period, Siva received monies from Lee as payment for the purchase of the red earth and rock materials extracted from the land. G These payments were far below the market value of materials similar to 'red earth'.

*The first defendant's defence (Siva)*

H **[7]** Siva premised his defence on the following facts:

(a) Siva was a director of KHH at all material times;

(b) Siva was not aware of his purported removal as director;

I (c) any removal of Siva as a director of KHH is unlawful and null and void;

(d) vide two letters dated 1 July 2009 and 26 January 2010, respectively, Mr Lim Thian Hock, the managing director and owner of the plaintiffs,

had appointed Siva as the general manager of the Kang Hai Group of companies and had delegated all powers and duties of managing KHH and KHR companies to Siva;

(e) Siva was at all times acting with authority and with the instructions of Mr Lim Thian Hock pursuant to the letters dated 1 July 2009 and 26 January 2010 respectively;

(f) the extraction and removal of the red earth from the plaintiff's land by Lee was done pursuant to a valid contract between the plaintiffs and Lee;

(g) Siva was authorised to collect payment and manage the plaintiffs' properties pursuant to a letter dated 15 February 2010 signed by Mr Lim Thian Hock; and

(h) the monies collected by Siva under the contract were given to the plaintiffs or Mr Lim Thian Hock on behalf of the plaintiffs.

*The second defendant's defence and counterclaim (Lee)*

**[8]** Essentially Lee's defence is premised on these grounds:

> Firstly, Lee paid a deposit of RM10,000 to KHR for the red earth in April 2009. In May 2009, he was given an offer by Lim Thian Hock in a letter dated 19.5.2009 (D48, Tab 32 CCB). Secondly, he relied on Siva's representations in his dealings with him. Thirdly, he lawfully extracted and removed red earth and rock material from Lots 2929 and 2930 pursuant to the 2009 Letter and the Tenancy Agreement. Lee further counterclaimed for the loss of profits for breach of the 2009 Letter and Tenancy Agreement.

## SYNTHESIS OF THE DECISIONS OF THE HIGH COURT AND THE COURT OF APPEAL

**[9]** On the 22 August 2016, this court granted leave to appeal on two questions of law (AR pp 2–4) and we deal with the first question posed first ie:

> (1) Can the rule in Turquand's case apply to a situation where an outsider dealing with the company is deemed to have constructive notice of the identity of the directors and Managers of a company as shown in the Form 49 of the Company?

**[10]** 'The outsider' by terms of reference in this appeal would be Lee. *The tenancy agreement* in question is dated 8 September 2009 (Tab 26 common bundle of document). The tenancy agreement describes the landlord as one Lim Thian Hock ('LTH') not KHH who is the registered owner of the land in question. Looking at the position of the companies at the time of the said tenancy agreement ie 8 September 2009, in respect of Kang Hai Holding Sdn Bhd ('KHH') as at 13 September 2008, Siva had ceased to be a director whilst Lim Thian Hock @ Lim Thiam Hock (LTH) continued to remain a director.

A In the case of Kang Hai Realty Sdn Bhd ('KHR'), whilst LTH was a director, Siva was not a director.

**[11]** The plea of KHR was that Siva had represented and/or held himself out to be managing director ('MD') and a director of the plaintiffs (see paras 3, 4, 8, 9 and 10 of the statement of claim). KHH and KHR's plea of representation of authority was against Siva and the specific representation that Siva was the MD/director of both companies at the execution of the tenancy agreement and the extraction of sand from the plaintiffs' land.

**[12]** The searches clearly reveal that Siva was not a director nor MD of the plaintiff companies and that fact, Lee is deemed to have constructive knowledge of, and it did not matter whether he believed, by reputation or otherwise, Siva was. It is also abundantly clear that Lee did not make any company searches nor searches on the land.

**[13]** The defence of Lee is based essentially on the locus classicus in this area of the law ie the rule in *Turquand* derived from the case of *Royal British Bank v Turquand* [1843–60] All ER Rep 435 which is etched in almost every major text on company law. The case held and we quote:

> *Persons dealing with the company were bound to make themselves acquainted with the statute and the deed of settlement of the company, but they were not bound to do more; a person, on reading the deed of settlement, would find, not a prohibition against borrowing, but a permission to borrow on certain conditions, and, learning that the authority might be made complete by a resolution, he would have a right to infer the fact of a resolution authorising that which on the face of the document appeared to be legitimately done; and, therefore, the company was liable whether or not a resolution had been passed.* (Emphasis added.)

**[14]** This principle has been adopted by this court with the necessary modifications in the case of *Pekan Nenas Industries Sdn Bhd v Chang Ching Chuen & Ors* [1998] 1 MLJ 465 and to a whole plethora of cases that deal with the point. With the rapid development of modern technology, and the access to information available in the database of the Companies Commission of Malaysia, the law in our view imposes a minimum duty on the 'outsider' to, at the very least, make this minimum check to afford the outsider the protection of the rule in *Turquand*. We refer to the decision of this court in *Pekan Nenas Industries Sdn Bhd* where it was held:

> (2) *The rule in Turquand's case cannot be invoked if the outsider relying on the rule knows or ought to have known that there is an irregularity. The material time at which there must be knowledge or the means of knowledge is the time of entry into the transaction, in this case, 3 December 1990. The outsider thus bears the burden of showing that he is not disqualified from invoking the rule.* The Court of Appeal, in deciding the rule in *Turquand*'s case did not apply, relied on certain circumstances

which it considered must have put Dato Tan, who represented the purchaser/intervener, 'on inquiry' and thus wrongly concluded he failed to make the necessary inquiries. In this case, the evidence supported the purchaser/intervener's contention that it was entitled to rely on the rule in *Turquand*'s case. (Emphasis added.)

**[15]** We also refer to the illuminating judgment of Edgar Joseph JR FCJ from para (F) at p 507 to para (G) at p 508 and we quote:

*To put it another way, such an outsider may rely on the rule in Turquand's case which, when it applies, gives rise to an irrebutable presumption, so that the company concerned is debarred from establishing or relying on the fact that the proceedings were irregular and unauthorized.*

*The rule in Turquand's case cannot, however, be invoked by an outsider who knows or ought to know that there is an irregularity.*

More particularly, outsiders dealing with a company who know that some relevant procedure internal to the company has not been followed cannot invoke the benefit of the indoor management rule (see *Howard v Patent Ivory Manufacturing Co* (1888) 38 Ch D 156). This is an exception to the rule in Turquand's case and the burden of establishing it lies on the party invoking the exception and in this case, that would be the Father and his faction. Furthermore, outsiders dealing with a company could also be affected by knowledge of facts which would put a reasonable person on inquiry; in other words, they would be deemed to know what a reasonable person would infer from known facts. So, for example, in *B Liggett (Liverpool) Ltd v Barclays Bank Ltd* [1928] 1 KB 48 at pp 56–56, Wright J (as he then was) said:

> *... Whatever may be the exact scope of the rule in Turquand's case, I think it is quite clear on principle and on the authorities I have already referred to that it can never be relied upon by a person who is put on inquiry. The rule proceeds on a presumption that certain acts have been regularly done, and if the circumstances are such that the person claiming the benefit of the rule is really put on inquiry, if there are circumstances which debar that person from relying on the prima facie presumption, then it is clear, I think, that he cannot claim the benefit of the rule ...*

And, in *Morris v Kanssen & Ors* [1946] AC 459, Lord Simonds made it clear that an outsider cannot invoke the benefit of the *Turquand* rule if he is put upon inquiry. Here is what His Lordship said on this point (at p 475):

> ... He cannot presume in his own favour that things are rightly done if inquiry that he ought to make would tell him that they were wrongly done.

*So also, an outsider dealing with a company cannot invoke the benefit of the Turquand rule if he could or should in the circumstances have discovered the defect by inspecting the compulsory documents filed at the Registry of Companies which are open to public inspection. (See Irvine v Union Bank of Australia* (1877) 2 App Cas 366.)

The material time at which there must be knowledge or the means of knowledge is the time of entry into the transaction. (See *Kanssen v Rialto (West End) Ltd & Ors* [1944] Ch 346; *Morris v Kanssen & Ors* [1946] AC 459.)

A We need hardly add that the rule in Turquand's case is designed to protect not the company itself but persons dealing with the company. It follows that there is no reason why persons, including outsiders, who enter into transactions with a company, and who are sued should not invoke the benefit of the rule as a defence. (See *Howbeach Coal Co Ltd v Teague* (1860) 5 H & N 151; 157 ER 1136; *Garden* B *Gully United Quartz Mining v McLister* (1875) 1 App Cas 39.)

So far as the burden of proof is concerned, when the doctrine of the bona fide purchaser for value without notice is invoked, we are inclined to the view that the burden of showing lack of notice is on the person invoking the doctrine. (See *Ninety-Five Pty Ltd v Banque Nationale de Paris* (1988) WAR 132; cf *Re Dover Pty* C *Ltd* (1981) 6 ACLR 307 at p 310.)

*Whether or not the outsider was put on notice is a question of fact on which other cases are of no assistance.* (Emphasis added.)

D **[16]** Lee in this case on the facts did not verify the position of Siva in the plaintiffs' companies by way of a search. Lee did not check on the status of the land and all payments were made to Siva (see notes of evidence Tab 28, pp 197–209).

E **[17]** The learned judge in paras 43, 44–48 of his grounds of judgment made findings of fact in relation to the authority of Siva to act on behalf of the plaintiffs which the learned judge held he had not. The Court of Appeal particularly in paras 30–31 of their grounds of judgment found there was no evidence to impute Lee with a need to be put on an enquiry, despite the fact F that Lee had failed to make any company or land searches. We found the Court of Appeal had misdirected itself on its reversal of the High Court finding of facts and curial intervention is called for.

**[18]** Reference is drawn also to the case of *Criterion Properties plc v Stratford* G *UK Properties LLC and others* [2004] UKHL 28 and we quote at para 31 the judgment of Lord Scott:

[31] Both Hart J and the Court of Appeal thought that the SSA was clearly contrary to the commercial interests of Criterion. Hart J thought that Oaktree must have known, or be taken to have known, that that was so. I do not wish to be taken to be H saying that knowledge of this sort on the part of Oaktree, or knowledge by Oaktree that Mr Glaser and Mr Palmer were, in signing the SSA, in breach of the duty they owed to Criterion, would be irrelevant to the authority issue. *If a person dealing with an agent knows th at the agent does not have actual authority to conclude the contract or transaction in question, the person cannot rely on apparent authority. Apparent* I *authority can only be relied on by someone who does not know that the agent has no actual authority. And if a person dealing with an agent knows or has reason to believe that the contract or transaction is contrary to the commercial interests of the agent's principal, it is likely to be very difficult for the person to assert with any credibility that he believed the agent did have actual authority. Lack of such a belief would be fatal to a claim that the agent had apparent authority.* (Emphasis added.)

Siva's plea of actual authority had been rejected by both the High Court and Court of Appeal. It therefore follows Siva acted on a frolic of his own. We find the High Court judge was correct in rejecting a plea of ostensible authority as the evidence clearly shows Lee could have ascertained the actual position by making the relevant searches.

**[19]** What is the effect of the particulars of Form 49 on an 'outsider'? We refer to the decision of this court in *KL Engineering Sdn Bhd & Anor v Arab Malaysian Finance Bhd* [1994] 2 MLJ 201:

> (1) The common law doctrine of constructive notice should apply to Form 49 which is a public document containing particulars of directors who are the mind and will of the company as well as managers and secretaries who are responsible for the day-to-day running of the company. Therefore, persons dealing with the company should check with the Registrar of Companies who its directors, managers and secretaries are at any time.
>
> (2) As Form 49 is a public document to which the common law doctrine of constructive notice applies, the respondent, who had been put upon inquiry of its contents, but failed to check, must be presumed to have known that Kow Yuen Wah was not a director of the first appellant and was therefore, not authorized to sign the hire-purchase agreement on the company's behalf. Accordingly, as the hire-purchase agreement was signed by an unauthorized person on behalf of the first appellant, the latter could not be made liable under the hire-purchase agreement.

And to the judgment of Mohamed Dzaiddin SCJ delivering judgment of the court particular at p 208 para (B) to p 209 para (E), which we quote in agreement:

> However, the next important question is whether Form 49 comes within the category of public documents upon which persons dealing with the company is deemed to have notice of its contents. The learned author of Charlesworth & Cain on Company Law is of the view that the doctrine applies presumably to the list of directors because it is a public document which is open to public inspection at the Registry of Companies. On the other hand, the learned author of 1 *Palmer's Company Law* (24th Ed) discussed the issue in more detail at para 21–02:
>
> > It is sometimes not easy to determine which of the company's documents are public documents and which concern only its internal management. In principle only documents which are registered with the Registrar can be public documents, but, as we shall see, not all of them have this character.
> >
> > Obviously the memorandum and the articles are public documents. Special resolutions, if duly registered in accordance with s 380, likewise become public documents. The same would appear to apply to other resolutions required to be registered under s 380.
> >
> > It would further appear that charges on the undertaking of the company or on specific property belonging to it, if registered accordi ng to s 395 et seq, are likewise public documents, but this applies only to the registered particulars and not to 'special provisions contained in that charge restricting the company from

A dealing with their property in the usual manner when the subsisting charge is a floating security'.

> Beyond this no guidance can be obtained from decided cases on what are public documents of registered companies. It is thought that not all documents which a company has to register fall within that category. A distinction has to be drawn between documents affecting the powers of the company and its agents and other documents. Only documents which fall into the former category are public documents, eg the other resolutions — other than special resolutions — requiring registration under s 380 and particulars relating to the directors (see s 288), but documents falling within the second category, such as balance sheets or entries in the register of directors' interests (see s 325), are not, it is thought, 'public documents' because their purpose is merely to provide information of the financial position of the company or the interest of its managers in the company.

The conclusion that follows from the above opinion, with which we respectfully agree, is that the common law doctrine of constructive notice should apply to Form 49. To reiterate, Form 49 is a public document which contains particulars of directors who are the mind and will of a company, as well as managers and secretaries who are responsible for the day-to-day running of the company. It is a document which affects the powers of the company and its agents. Certainly, its purpose must be more than just to provide information about the company's directors, managers and secretaries. Therefore, persons dealing with the company should check with the Registrar of Companies who its directors, managers and secretaries are at any given time.

Cik Jennifer Tay has urged us to treat Form 49 as an 'indoor management' document so that the respondent could take advantage of the rule in *Turquand*'s case. This rule was stated by Lord Simonds in *Morris v Kanssen* as follows (at p 474):

> But persons contracting with a company and dealing in good faith may assume that acts within its constitution and power have been properly and duly performed and are not bound to inquire whether acts of internal management have been regular.

According to His Lordship (at p 475):

> It is a rule designed for the protection of those who are entitled to assume, just because they cannot know, that the person with whom they deal has the authority which he claims. This is clearly shown by the fact that the rule cannot be invoked if the condition is no longer satisfied, that is, if he who would invoke it is put upon his inquiry. He cannot presume in his own favour that things are rightly done if inquiry that he ought to make would tell him that they were wrongly done.

*Based on Lord Simond's dictum, we say with confidence that the rule in Turquand's case does not apply here. We hasten to add that as Form 49 (D14) is a public document to which the common law doctrine of constructive notice applies, the respondent, having been put upon inquiry of its content, but failed to check, must be presumed to have known that at the material time, James Kow Yuen Wah was not a director of the first appellant and was, therefore, not authorised to sign P7 on the company's behalf. Accordingly, as P7 was signed by an unauthorised person on behalf of the first appellant,*

*the latter cannot be made liable under the hire-purchase agreement, P7.* (Emphasis added.)

**[20]** It is no longer a question of whether the 'outsider' had been put on enquiry, but the 'outsider' had imputed to him particulars of Form 49 and should have taken steps to enquire further to come within the rule of *Turquand*. By way of further illustration of the point, we refer to the decision of the High Court of Australia in *Northside Developments Pty Ltd v Registrar-General* (1990) 93 ALR 385 where it was held:

(i) Per Mason CJ and Brennan J: semble Dawson, Toohey and Gaudron JJ obiter: A third party dealing with a company is not entitled to rely on the formal validity of an instrument and to assume that the seal has been regularly affixed if the very nature of the transaction is such as to put him on inquiry. A person dealing with a company is put upon inquiry when that company enters into a transaction which appears to be unrelated to the purposes of its business and from which it appears to gain no benefit.

(ii) Per Mason CJ, Dawson and Toohey JJ: There was no representation by the directors that the seal was affixed with their authority or that they had approved the transaction. The transaction was completed without the actual or apparent authority of the appellant.

**[21]** We also refer to the judgment of Mason CJ at para 40 pp 395–396 which we now quote:

*What is important is that the principle and the criterion which the rule in Turquand's case presents for application give sufficient protection to innocent lenders and other persons dealing with companies, thereby promoting business convenience and leading to just outcomes. The precise formulation and application of that rule call for a fine balance between competing interests. On the one hand, the rule has been developed to protect and promote business convenience which would be at hazard if persons dealing with companies were under the necessity of investigating their internal proceedings in order to satisfy themselves about the actual authority of officers and the validity of instruments. On the other hand, an overextensive application of the rule may facilitate the commission of fraud and unjustly favour those who deal with companies at the expense of innocent creditors and shareholders who are the victims of unscrupulous pe rsons acting or purporting to act on behalf of companies Agency principles aside, to hold that a person dealing with a company is to put upon inquiry when that company enters into a transaction which appears to be unrelated to the purposes of its business and from which it appears to gain no benefit is, in my opinion, to strike a fair balance between the competing interests.* (Emphasis added.)

We are in consonant with the views expressed by Mason CJ, that the contemporary approach to the rule in *Turquand*, should be the approach as suggested by Mason CJ.

We therefore answer Q1 in the negative.

Question (ii) approved by the court (see AR pp 2–4) is as follows.

*Can an outsider rely on the rule in Turquand's case and the principles of ostensible authority of a person to bind a company where the 'holding out' or representation of authority is made solely by the person with no authority?*

**[22]** Siva had no authority to act for the companies. There were no resolutions produced to testify to that fact. The purported letters of authority remained as ID and were never tendered as exhibits and LTH was never called to testify. There had been extensive submissions as to the plaintiffs infringing s 114 illustration (g) of the Evidence Act 1950 but the burden to show authority rested with Siva. At any rate, his plea of authority had failed both in the High Court and in the Court of Appeal. Upon observation of the tenancy agreement (see Tab 26 CCB), it is noted that LTH and not Siva had signed the tenancy agreement as the landlord. In fact the only representation of ostensible authority had been made by Siva and that is the plea of Lee. Under those circumstances can the respondent plead the rule in *Turquand*? The answer is most certainly no.

**[23]** We refer to the often quoted case of *Freeman and Lockyer (a firm) v Buckhurst Park Properties (Mangal) and Another* [1964] 1 All ER 630 and to the judgment of Lord Diplock at pg 645 paras E–H and p 646 paras A–C and we quote:

> *The second characteristic of a corporation, viz, that unlike a natural person it can only make a representation through an agent, has the consequence that, in order to create an estoppel between the corporation and the contractor, the representation as to the authority of the agent which creates his 'apparent' authority must be made by some person or persons who have 'actual' authority from the corporation to make the representation. Such 'actual' authority may be conferred by the constitution of the corporation itself, as, for example, in the case of a company, on the board of directors, or it may be conferred by those who under its constitution have the powers of management on some other person to whom the constitution permits them to delegate authority to make representations of this kind. It follows that, where the agent on whose apparent' authority the contractor re lies has no 'actual' authority from the corporation to enter into a particular kind of contract with the contractor on behalf of the corporation the contractor can not rely on the agent's own representation as to his actual authority. He can rely only on a representation by a person or persons who have actual authority to manage or conduct that part of the business of the corporation to which the contract relates.*
>
> If the foregoing analysis of the relevant law is correct, it can be summarised by stating four conditions which must be fulfilled to entitle a contractor to enforce against a company a contract entered into on behalf of the company by an agent who had no actual authority to do so. It must be shown: (a) that a representation that the agent had authority to enter on behalf of the company into a contract of the kind sought to be enforced was made to the contractor; (b) that such representation was made by a person or persons who had 'actual' authority to manage the business of the company either generally or in respect of those matters to which the contract

relates; (c) that he (the contractor) was induced by such representation to enter into the contract, ie that he in fact relied on it; and (d) that under its memorandum or articles of association the company was not deprived of the capacity either to enter into a contract of the kind sought to be enforced or to delegate authority to enter into a contract of that kind to the agent.

The confusion which, I venture to think, has sometimes crept into the cases is, in my view, due to a failure to distinguish between these four separate conditions, and in particular to keep steadfastly in mind (first) that the only 'actual' authority which is relevant is that of the persons making the representation relied on, and (second) that the memorandum and articles of association of the company are always relevant (whether they are in fact known to the contractor or not) to the questions (i) whether condition (b) is fulfilled, and (iii) whether condition (d) is fulfilled, and (but only if they are in fact known to the contractor) may be relevant (c) as part of the representation on which the contractor relied. (Emphasis added.)

**[24]** The pleadings of Lee clearly show the representation of authority relied on were made by Siva to Lee and that Siva was the MD and director of both companies at the time of the contract but Lee had constructive knowledge that Siva was not (see para 7 of Lee's statement of defence p 101, CCB).

**[25]** The learned trial judge in his grounds of judgment at para 42 clearly set out the representations made by Siva to Lee. The apparent authority granted by LTH in these letters remained IDs. The learned trial judge in para 42 of the ground of judgment clearly made a finding of fact that Siva had no authority actual or ostensible to act for the companies. The Court of Appeal in its ground of judgment, in para 25, accepts that no searches on the land or with SSM were made. This specific issue as a corollary to the rule in *Turquand* was not considered by the Court of Appeal as a precondition to relying on the rule in *Turquand*.

**[26]** We therefore answer question (ii) in the negative.

**[27]** In the upshot:

(a) the appeal is allowed with costs of RM30,000 to the appellants subject to allocator fee;

(b) the order of the Court of Appeal is set aside;

(c) the order of the High Court is restored; and

(d) deposit is refunded.

A *Appeal allowed, both leave questions answered in the negative, the decision of the COA set aside and the decision of the High Court restorted.*

Reported by Ashok Kumar

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